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No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

James Tarsney, Joe Loeffler, Wayne Olhoft, Tad Jude, Dr. Steve Calvin, Dr. Karen Kam, Dr. Konald Prem, Dr. Stanley Johnson, Brian Gibson, Jack Weiland, Russ Rooney, Mary Rooney, David Racer, Eugene Keating, Joseph Kueppers, John C. Cerrito, David States, Mary Kay States, Keith Jensen, Elizabeth Jensen, Roberta Becker, Linda Pettman, Karen Messicci, Angela Heithaus, Renae LaVoi, Cheri Emde, Mary Jacobs, Judy Hadley, Beth Gerlach, Mitzi Speranzella, Joan Appleton, Becky Saad, Marlene Reid, Bernadine Scroggins, Dr. Paul Spencer, Judi Spencer, Virginia Benyon, Jenifer Latawiec, Maria Schmitz, Barbara (Basis) Zebro, Cletus Tauer, Ramona Tauer, Peg Cullen, Meghan Jones, Mary Prior, Ruth Powers, Jolene Schmitz,

Petitioners,

vs.

Commissioner Michael O'Keefe, Department of Human Services, State of Minnesota,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the majority opinion's state taxpayer standing standard is in conflict with state standing requirements in other circuits.

2. Whether Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752 (1982) precludes the majority opinion holding that Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1982 (1968) only applies to Establishment Clause taxpayers and not Free Exercise Clause taxpayers.

3. Whether the Plaintiffs' allegations of violations of their right to free exercise of religion and due process, under § 1983, is sufficient to confer standing or must they also satisfy state taxpayer standing requirements.

4. Whether the "general law of neutral applicability" standard set forth in Employment Division, Dept. of Human Res. v. Smith, 494 U.S. 872, 110 S. Ct. 1595 (1990) applies to state Supreme Court orders.

5. Whether the state exception in the Hyde Amendment is limited to state legislative actions or can the state exception be mandated by state court order.

6. Whether state courts may interpret state constitutions inconsistent with the Hyde Amendment and/or Casey v. Planned Parenthood of Southeastern Pennsylvania, 505 U.S. 888, 112 S. Ct. 2791 (1992).

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceeding in the court below:

James Tarsney, Joe Loeffler, Wayne Olhoft, Tad Jude, Dr. Steve Calvin, Dr. Karen Karn, Dr. Konald Prem, Dr. Stanley Johnson, Brian Gibson, Jack Weiland, Russ Rooney, Mary Rooney, David Racer, Eugene Keating, Joseph Kueppers, John C. Cerrito, David States, Mary Kay States, Keith Jensen, Elizabeth Jensen, Roberta Becker, Linda Pettman, Karen Messicci, Angela Heithaus, Renae LaVoi, Cheri Emde, Mary Jacobs, Judy Hadley, Beth Gerlach, Mitzi Speranzella, Joan Appleton, Becky Saad, Marlene Reid, Bernadine Scroggins, Dr. Paul Spencer, Judi Spencer, Virginia Benyon, Jenifer Latawiec, Maria Schmitz, Barbara (Basia) Zebro, Cletus Tauer, Ramona Tauer, Peg Cullen, Meghan Jones, Mary Prior, Ruth Powers, Jolene Schmitz, as individual Minnesota citizens who pay taxes to the State of Minnesota; Michael O'Keefe, in his capacity as Commissioner of the Department Human Services, the department ordered to disburse state funds for abortions pursuant to the Order in Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995); the Department of Human Services; the State of Minnesota.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, forty-seven citizens of the state of Minnesota who pay taxes to the state of Minnesota but object to the court ordered appropriation of state funds for abortions, respectfully pray that a Writ of Certiorari be issued to review the judgment of the Eighth Circuit Court of Appeals affirming the decision of the United States District Court, District of Minnesota, dismissing the Petitioners' Complaint for lack of standing. In plain contravention of the standing rules governing taxpayer contests of state taxation on constitutional grounds in existence in the Eighth Circuit, and in conflict with rules announced in other circuits and the United States Supreme Court, the Eighth Circuit Court of Appeals has disallowed Petitioners' Complaint on the basis that Free Exercise Clause taxpayer rights must be treated differently than Establishment Clause taxpayer cases. Because the Petitioners' claims involve federal constitutional rights and congressional legislation that has been ignored by the Minnesota Supreme Court's exercise of raw judicial power, which effectively thwarted the will of the Electorate as well as the judgments of the Minnesota State Legislature, United States Congress, and the United States Supreme Court, this case involves issues of considerable federal importance.

OPINIONS BELOW

The Memorandum and Order of the United States District Court, District of Minnesota, dismissing the complaint is unpublished and is reprinted in the appendix hereto, p. A-2.

The opinion of the Eighth Circuit Court of Appeals is published at 225 F.3d 929 (8th Cir. 2000) and is reprinted in the appendix hereto, p. A-9.

The denial of the Petition for Rehearing is reprinted in the appendix hereto, p. A-31.

JURISDICTION

The jurisdiction of the Court to review the Order of the Eighth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

Petitioner brought this action in Minnesota's federal district court on February 26, 1999. Respondents brought a Motion to Dismiss which was granted by Order filed June 24, 1999. Petitioner appealed to the United States Court of Appeals, Eighth Circuit, which affirmed the District Court by Order filed September 11, 2000, and Petitioner's Petition for Rehearing and Suggestion for Hearing En Banc was refused, by Order filed November 9, 2000. The Petition has been submitted within ninety (90) days of the denial of the Petition for Rehearing and is, accordingly, timely under Rule 13.4 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of region, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hyde Amendment, Omnibus Consol. & Emerg. Supp. Approp. Act of 1999, Pub. L. No. 105-277, Tit. V, §§ 508-09, 1998 U.S.C.C.A.N. (112 Stat.) 2681-385.

Sec. 508. (a) None of the funds appropriated under this Act, and none of the funds in any trust fund to which funds are appropriated under this Act, shall be expended for any abortion.

(b) None of the funds appropriated under this Act, and none of the funds in any trust fund to which funds are appropriated under this Act, shall be expended for health benefits coverage that includes coverage of abortion.

(c) The term "health benefits coverage" means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.

Sec. 509. (a) The limitations established in the preceding section shall not apply to an abortion—

(1) if the pregnancy is the result of an act of rape or incest; or

(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.

(b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds).

(c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality

to contract separately with such a provider for such coverage with State funds (other than a State's or locality's contribution of Medicaid matching funds).

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Minn. Stat. § 256B.0625

Subd. 16. Abortion services. Medical assistance covers abortion services, but only if one of the following conditions is met:

(a) The abortion is a medical necessity. "Medical necessity" means (1) the signed written statement of two physicians indicating the abortion is medically necessary to prevent the death of the mother, and (2) the patient has given her consent to the abortion in writing unless the patient is physically or legally incapable of providing informed consent to the procedure, in which case consent will be given as otherwise provided by law;

(b) The pregnancy is the result of criminal sexual conduct as defined in section 609.342, clauses (c), (d), (e)(i), and (f), and the incident is reported within 48 hours after the incident occurs to a valid law enforcement agency for investigation, unless the victim is physically unable to report

the criminal sexual conduct, in which case the report shall be made within 48 hours after the victim becomes physically able to report the criminal sexual conduct; or

(c) The pregnancy is the result of incest, but only if the incident and relative are reported to a valid law enforcement agency for investigation prior to the abortion.

STATEMENT OF THE CASE

This is an appeal from the Judgment entered by the Eighth Circuit Court of Appeals, one judge dissenting, filed September 11, 2000, which affirmed the dismissal of Plaintiffs' Complaint under Rule 12(b)(1) and 12(b)(6) by the Minnesota District Court on June 24, 1999. The Plaintiffs' Petition for Rehearing En Banc was denied on November 9, 2000.

The District Court decision was based on its holding that Plaintiffs did not have standing, as taxpayers, to contest state expenditures that Plaintiffs believe violated their free exercise of religion. The District Court Opinion was based upon its analysis that Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1982 (1968), only granted standing to taxpayers contesting expenditures that violate the Establishment Clause and not to taxpayers contesting expenditures under the Free Exercise Clause. Plaintiffs' arguments in opposition to Defendants' motion that 42 U.S.C. § 1983 also granted standing for state action that violated both the Free Exercise Clause and the Due Process Clause, without reference to their status as taxpayers, was not addressed by either the Defendants or the District Court.

The Eighth Circuit Court of Appeals affirmed the District Court holding that state taxpayers have no standing under the Free Exercise Clause, as they would under the Establishment Clause, on the basis of Flast v. Cohen. The majority opinion rejected Plaintiffs' arguments (1) that Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) precludes the distinction made by the majority opinion that Flast applies only to Establishment Clause claims, and (2) that Doremus v. Board of Education, 341 U.S. 429 (1952) guided the application of state standing rules, not Flast v. Cohen.

The dissenting opinion in the Eighth Circuit Court of Appeals argued that Doremus applies to state taxpayer standing and that the majority opinion in this case creates a new standard for state taxpayer cases in conflict with other circuits and the prior understanding of state taxpayer standing in the Eighth Circuit Court of Appeals. The dissenting opinion did not address Plaintiffs' arguments that they would have standing under Flast v. Cohen because of his apparent belief that the proper application of Doremus may make the District Court and majority opinions' interpretation of Flast irrelevant in state taxpayer cases.

REASONS FOR GRANTING THE PETITION

One of the virtues of democracy is that it allows the people to change their minds, over time, that what they assume to be true is not so, and to change their laws accordingly. United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 2291-2292 (1996) (Justice Scalia dissenting). As a means to preserve the debate, the United States Supreme Court has struck a balance concerning the most controversial issue of the last twenty-five years — abortion — by preserving the right of a woman to have an abortion but also preserving the ability of the people who conscientiously object to the termination of the life of the unborn child to not have to pay for the abortions by leaving the issue of taxpayer-funded abortions with the legislature. Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 62 L.Ed.2d 784 (1980). Congress had followed the same thoughtful balance in enacting the Hyde Amendment, which limits taxpayer-funded abortions in cases in which the Social Security Act, through the Medicaid provisions of the Act, pre-empt state discretion, but specifically allows the state to deal with the issue differently under its own laws and its own programs.

At least nineteen court decisions have now been issued addressing the taxpayer-funded abortion issue under state law.

Thirteen state courts have decided that what the U.S. Supreme Court and Congress determined to be a legislative issue should be a judicial issue. Valley Hospital Association, Inc., v. Mut-SU Coalition for Choice, 948 P.2d 963 (Alaska 1997); Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981); Doe v. Maher, 515 A.2d 134 (Conn. S. Ct. 1986); Doe v. Wright, No. 91 Ch. 1958 (Cir. Ct. of Cook Co. 1994); Moe v. Secretary of Administration and Finance, 417 N.E.2d 387 (Mass. 1981); Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995); Jeanette R. v. Nancy Ellery, Civil Action No. BD 94811 (Mont. 1st Jud. Dist. 1994); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Roe v. Harris, Case No. 96977 (Idaho Dist. Ct. 1984); Doe v. Celini, No. 581-84 CnC (Vt. S. Ct. 1986); Womens Health Center v. Panepinto, 446 S.E.2d 658 (W. Va. 1993); New Mexico Right to Choose v. Dorothy Danfelser, Sf. 95-867(c) (1st Dist. Ct. N.M. 1998); Planned Parenthood, Inc. v. Dept. of Human Resources, 687 P.2d 785 (Or. 1984). Six states disagree. Harris v. McRae, 448 U.S. 297 (1980); Doe v. Childers, No. 94C102183 (Ky. Dist. Ct. 1995); Doe v. Director of Dept. of Social Services, 487 N.W.2d 166 (Mich. 1992); Josie J. v. North Carolina Dept. of Human Resources, 491 S.E.2d 535 (N.C. 1997); Fischer v. Com. Dept. of Public Welfare, 508 A.2d 114 (Pa. 1985); Jane L. v. Bangerter, 794 F. Supp. 1537 (D. Utah, 1992). None of these cases involve taxpayer challenges to the authority of the judiciary to take the appropriations function from the legislature and then constitutionalizing the entitlement to government funding for a medical procedure which over half the voters would like to make illegal.

The Minnesota Supreme Court attempted to ultimately decide this most controversial issue for the taxpayers of Minnesota in the case of Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995). With reference and approval, but little analysis to the citations of other courts that had similarly decided the issue, and with reference and approval, but little analysis to Minnesota's state constitution, the Minnesota Supreme Court

noted its preference for the dissenting opinion in Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 62 L.Ed.2d 784 (1980) and struck down Minnesota's state statutes restricting taxpayer-funded abortions which had been in effect since 1978. The Doe v. Gomez decision was ostensibly based upon Minnesota's state constitution but no reference was made to its history, text or traditions that supported a deviation from federal constitutional principles. The Minnesota Supreme Court's frivolous constitutional adventurism, which disregarded both federal law and the expressed will of the people, was accomplished in a class action case in which there were no identifiable individual plaintiffs to support class certification or to testify to the facts of the case sufficient to establish any record. The defendants in Doe v. Gomez, including the defendant in this case, stipulated to the fictitious plaintiff's allegations and to the District Court and Supreme Court's independent fact finding, despite an extensive factual record developed at the time of the legislation by the Minnesota state legislature which substantially contradicted the factual findings of the court. cf., Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L.Ed.2d 659 (1981).

In response, with the support of the Minnesota legislature, these forty-seven plaintiffs, which include the original Senate and House sponsors of the statute struck down by the Minnesota Supreme Court, sought the intervention of the federal court to vacate the order of the Minnesota Supreme Court mandating that the legislature appropriate, and the taxpayers pay for abortions not covered by federal funds because of the Hyde Amendment. In this case, the plaintiffs have challenged the authority of the Minnesota Supreme Court to enter the order that they entered.

The plaintiffs have argued that the Minnesota Supreme Court has not only violated the separation of powers principle that expressly leaves the issue of what programs have to be funded to the legislature, not the courts, but has also exceeded

the limited state role envisioned by Congress in passing the Hyde Amendment. The plaintiffs have argued that the Minnesota Supreme Court was not interpreting state law. Rather, the Minnesota Supreme Court was interpreting federal law, indicating its preference for the dissenting opinion in Harris v. McRae, then calling it state constitutional law without reference to Minnesota's constitutional text, history or tradition. Additionally frustrating the Plaintiffs is that in Doe v. Gomez the Court discussed equal protection but specifically based its decision on due process. Minn. Const. Art. 1, §§ 2, 7 and 10. As a result, in Minnesota, the "right" to a publicly funded abortion is a substantive due process right, leaving the legislature no discretion to satisfy any equal protection arguments.

The plaintiffs filed their Complaint alleging that the Doe v. Gomez decision, by its effect and because of how the decision was rendered, violated the plaintiffs free exercise of religion and right to due process. The plaintiffs filed their Complaint entirely aware of and with respect to the United States Supreme Court decision in Employment Division, Dept. of Human Res. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990) (hereinafter Smith II). The United States Supreme Court's deference to the will of the legislature and concern for the separation of powers contrasts starkly with the Minnesota Supreme Court's usurpation of the legislature's prerogative in Doe v. Gomez. The Eighth Circuit Court of Appeals had already determined that a free exercise argument with allegations of fact tending to support a due process violation was an exception to the general rule announced in Smith II; Cornerstone Bible Church v. Hastings, 948 F.2d 464 (8th Cir. 1991). The Plaintiffs met that burden.

The plaintiffs' Complaint was dismissed and their appeal to the Eighth Circuit Court of Appeals denied on the basis of standing. Unquestionably, taxpayer plaintiffs have standing under the Establishment Clause even in federal taxpayer suits. In this state taxpayer lawsuit, alleging a violation of federal

statutes and the federal constitution, the district court and Eighth Circuit have held that Free Exercise taxpayers must be treated differently than Establishment Clause taxpayers. In effect, people offended by religion are treated differently than people offended because of their religion, which is not justified by Flast v. Cohen and apparently in direct conflict with Valley Forge. Furthermore, as the plaintiffs have also argued, which was supported by the dissenting opinion in the Eighth Circuit, taxpayer standing for state taxpayers is governed by Doremus, not Flast. The Eighth Circuit holding on standing is in direct conflict with federal constitutional authority and with decisions from other circuits. See Colorado Taxpayers Union, Inc. v. Romer, 963 F.2d 1394 (10th Cir. Ct. App. 1992) (requirement for federal and state taxpayer standing the same); Hookuli v. Ariyoski, 741 F.2d 1169 (9th Cir. Ct. App. 1984) (state taxpayer standing found where each plaintiff alleged status as a taxpayer and identified amounts of money appropriated for challenged actions); Taub v. Kentucky, 842 F.2d 912 (6th Cir. Ct. App. 1988) (state and federal taxpayer standing the same); Doe ex rel. v. Beaumont Independent School District, 173 F.3d 274 (5th Cir. Ct. App. 1999) (distinguished state and federal taxpayer standing and apply Doremus to state taxpayer standing); Board of Education of the Mt. Sinai Union Free School District v. New York State Teachers Retirement System, 60 F.3d 106 (2nd Cir. Ct. App. 1995) (recognizing that courts are employing different interpretations of Doremus in regard to the question of taxpayer standing).

This case is not a matter of state constitutional law for consideration by a state supreme court nor is it a matter of merely local concern. This case is about how people are governed, see Daniels v. Williams, 474 U.S. 327, 332, 106 S. Ct. 662, 665 (1986) and whether state courts have the final authority to decide the most important matter of our democracy. See Bush v. Gore, 121 S. Ct. 525 (2000). Standing rules have been established to prevent the courts

from having to decide every political issue. Standing rules have not been established to prevent citizens from exercising their democratically endowed rights just because the court has decided to intervene. The Eighth Circuit has said that standing is about having the right people in the right forum. Friedman v. Sheldon Community School District, 995 F.2d 802, 804 (8th Cir. 1993). The United States Supreme Court has grounded its standing consideration on the separation of powers issue. Employment Division, Dept. of Human Res. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990). When the Minnesota Supreme Court ruled that the executive branch had to appropriate public funds, despite the state legislature's express directives to the contrary, the proper separation of powers principle mandates that the court grant standing to the only non-participants to the Doe v. Gomez decision: the taxpayers and the legislature. The taxpayers and legislature are both represented as plaintiffs in this lawsuit. The current legislature filed a brief as an amicus curiae in the Eighth Circuit Court of Appeals. The Minnesota Supreme Court rejected the Minnesota state legislature's attempt to file an amicus brief in Doe v. Gomez. The federal court is the only remaining forum and these plaintiffs are the only appropriate plaintiffs. The absence of access to the courts is the absence of justice. None of the cases that limit standing provide a precedent to this case.

I. IN THE MAJORITY OPINION, THE COURT ANNOUNCES A NEW STATE STANDING STANDARD THAT IS IN CONFLICT WITH THIS CIRCUIT AND OTHER CIRCUITS.

In Tarsney v. O'Keefe, 225 F.3d 929, 934 (8th Cir. 2000) the majority opinion expressly declined "to expand the holding" in Flast v. Cohen, 392 U.S. 83 (1968). The district court had held that standing was limited to objections under the Establishment Clause but not the Free Exercise Clause.

The dissent clearly and correctly points out that, previous to this case, state standing was based on Doremus v. Board of Education, 341 U.S. 429 (1952). That the Eighth Circuit had previously followed Doremus, not Flast, was well-expressed in the Amicus Brief submitted by the Roman Catholic Archdiocese of St. Paul and Minneapolis. The dissent and the Amicus Brief both correctly point out that the Eighth Circuit's leading case on state taxpayer standing, Minnesota Federation of Teachers v. Randall, 591 F.2d 1354 (1989), interpreted Doremus to conclude that what is required for state standing is to establish an expenditure of tax funds. Other circuits have also indicated that Doremus controls. See Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 793 (9th Cir. 1999); Board of Educ. v. New York State Teachers Retirement Sys., 60 F.3d 106, 110 (2nd Cir. 1995).

The majority opinion is in conflict with what appeared to be the rule in the Eighth Circuit and what is clearly the rule in other circuits.

II. THE HOLDING THAT STATE TAXPAYER STANDING IS LIMITED TO ESTABLISHMENT CLAUSE CASES IS A MISINTERPRETATION OF FLAST V. COHEN AND IN CONFLICT WITH VALLEY FORGE.

The Plaintiffs did not invite the court to expand Flast but to prevent the Defendants from making a distinction that is impermissible under Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). There is neither historical precedent nor a logical interpretation of Flast that would support the conclusion that taxpayer standing permits opposition to expenditures that may violate the Establishment Clause but not those that may violate the Free Exercise Clause. The "hierarchy of constitutional clauses" theory explicitly adopted in the district court and majority

opinions was expressly rejected by the United States Supreme Court in Valley Forge. The United States Supreme Court should hold that Flast specifically declined to make the distinction advanced by the Defendants and adopted by the Eighth Circuit majority opinion. The Plaintiffs argue that Doremus, not Flast, controls taxpayer standing. Unfortunately, the Eighth Circuit majority opinion announces a state taxpayer standing doctrine more restrictive than, and in conflict with, federal taxpayer standing requirements because the more restrictive state standing rule announced in this case is in direct conflict with Valley Forge.

III. THE MAJORITY OPINION DID NOT ADDRESS THE PLAINTIFFS' FREE EXERCISE CLAIMS UNDER 42 U.S.C. § 1983.

The Plaintiffs alleged in their Complaint and argued in their opposition to the Defendants' motion to dismiss that the action that resulted in the striking down of Minn. Stat. § 256B.0625(16) (1978) violated the Plaintiffs' free exercise and due process rights. The Plaintiffs have argued that the violation of their free exercise and due process rights permit an independent finding of standing under 42 U.S.C. § 1983. See Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322 (1969). The Eighth Circuit has held that an allegation of a violation of free exercise rights with a due process violation is sufficient to sustain a cause of action under Section 1983. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991). The Eight Circuit's holding in Cornerstone Bible was expressly based on an exception to the general rule regarding free exercise challenges to legislation discussed in Employment Division, Dept. of Human Res. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990). The Plaintiffs' free exercise standing as taxpayers is an additional argument if due process violations are also alleged. The Plaintiffs have alleged numerous and significant due process

violations that merit consideration under Section 1983. See Daniels v. Williams, 474 U.S. 327, 332, 106 S. Ct. 662, 665 (1986).

IV. THE MINNESOTA SUPREME COURT'S HOLDING IN DOE V. GOMEZ IS NOT A NEUTRAL LAW OF GENERAL APPLICABILITY THAT REQUIRES THE PLAINTIFFS TO SUBMIT TO AN INFRINGEMENT OF THEIR FREE EXERCISE RIGHTS.

Smith II has been interpreted to require individuals who claim a violation of their free exercise of religion to submit to neutral laws of general applicability. Smith II did not consider whether individuals must submit to the authority of a court decision when the individuals were not participants in the litigation. It is not likely that Smith II would be extended to deny these Plaintiffs relief on the merits because Smith II's adherence to separation of powers principles was the primary consideration in the Smith II holding. Separation of powers principles that would restrain the court's intervention are not present in cases, such as in this one, where the violation of the separation of powers doctrine by the state courts created the infringement. The federal court can, and should, consider this case on the merits.

V. THESE PLAINTIFFS ARE ENTITLED TO SECTION 1983 STANDING UNDER DALTON v. LITTLE ROCK FAMILY PLANNING SERVICES AND MAINE v. THIBOUTOT.

The Plaintiffs also disagree with the Eighth Circuit majority opinion finding that the intended beneficiaries of the Hyde Amendment are not the taxpayers who oppose taxpayer funded abortions. If Dalton v. Little Rock Family Planning Services, 116 S. Ct. 1063, 34 L. Ed. 115 (1996) grants

standing to institutional beneficiaries of the Medicaid Statute, permitting litigation of issues pertaining to the interpretation of the Hyde Amendment rider to the appropriations bill, then so too do these taxpayers have standing. The Hyde Amendment has as its purpose the protection of citizens who are offended by and opposed to, for religious reasons, taxpayer funded abortions.

Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) is authority for the proposition that beneficiaries of a federal statute have federal standing under § 1983 to contest violations of the federal statute by state actors. Just as in Bush v. Gore 121 S. Ct. 525 (2000), state actors, including the state Supreme Court, have used a misconstruction of state law to interfere with the proper application of a federal statute. These Plaintiffs have standing under Dalton and Maine v. Thiboutot to challenge whether the alleged independent state action complies with the strict requirements of the Hyde Amendment. See Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). Maine v. Thiboutot does not support an "intended beneficiary" rule so restrictive to exclude the plaintiffs from determining whether the defendants are adhering to the rigorous compliance requirements mandatory with respect to this statute and this particular issue.

The recent controversy and litigation over the presidential election highlights the same issues involved in this controversy which are no less important to the participants in the abortion struggle. State courts cannot make up state constitutional law because they desire to achieve a different result than mandated under federal law. The United States Supreme Court has not permitted state supreme courts to misinterpret federal constitutional law and then call it state constitutional law when there is no evidence that would support a state constitutional interpretation. Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983); Ohio v. Robinette, 117 S. Ct. 417, 420

(1996). The United States Supreme Court has created enough of a legal mess in this area by the Roe v. Wade, 410 U.S. 113, 93 S. Ct. 703, 35 L.Ed.2d 147 (1973) and Casey v. Planned Parenthood of Southeastern Pennsylvania, 505 U.S. 888, 112 S. Ct. 2791, 120 L.E.2d 674 (1992) opinions. State supreme courts should not be permitted to add to the turmoil.

CONCLUSION

Consideration of this case by the United States Supreme Court is both appropriate and necessary because of the confusion of state standing requirements set forth in the Eighth Circuit majority opinion. The Eighth Circuit Court of Appeals has not only created a different state taxpayer standing requirement than previously existed in the Eighth Circuit but it is a state standing requirement that is in conflict with other circuits. The important standing questions that should be considered by the United States Supreme Court are how should Flast and Doremus be reconciled and does Flast really create a separate category for Establishment Clause cases from Free Exercise Clause cases because that interpretation would then be in obvious conflict with Valley Forge. The other issues raised in this Petition are no less significant. The importance of the abortion issue to these Plaintiffs raises a legitimate Free Exercise issue which is not barred by Smith II because of the gross abuse of the separation of powers principles by the Minnesota Supreme Court. Finally, the attempt by the Minnesota Supreme Court to create out of nothing a whole new area of state constitutional law that directly conflicts with a federal statute should not be tolerated. If this issue is not considered by this United States Supreme Court, the citizens of Minnesota who oppose taxpayer funded abortions have no political or legal recourse available.

Respectfully Submitted,

Dated: February 7, 2001

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James Tarsney, et al.,

Plaintiffs,

v.

Civ. No. 99-332/RHK/JMM
MEMORANDUM OPINION AND ORDER

Commissioner Michael O'Keefe, Department of Human Services, and the State of Minnesota,

Defendants.

Wayne B. Holstad, Holstad and Knaak, St. Paul, Minnesota, for Plaintiffs.

John L. Kirwin, Assistant Minnesota Attorney General, St. Paul, Minnesota, for Defendants.

Introduction

Plaintiff James Tarsney and 44 other plaintiffs (collectively "the Plaintiffs") filed the instant suit against the State of Minnesota, the Minnesota Department of Human Services, and Commissioner Michael O'Keefe (collectively "the Defendants"), seeking (1) to enjoin them from paying for abortions in certain circumstances under Minnesota's Medical Assistance program ("MA") and General Assistance Medical

Care program ("GAMC"), (2) a refund of the portion of their taxes spent to fund abortion services, and (3) a declaration that the Minnesota Supreme Court's decision in Doe v. Gomez, 542 N.W.2d 17 (1995) is void. Currently before the Court is the Defendants' Motion to Dismiss. For the reasons stated below, the Court will grant the Motion.

Background

Much of the relevant history and statutory background giving rise to the instant case is described by the Minnesota Supreme Court in Doe. Medicaid is a joint federal-state program created under Title XIX of the Social Security Act, in which Minnesota participates through MA. See id. at 21-23. MA is designed to assist persons whose income and resources are insufficient to meet the costs of necessary medical care. See id. at 22-23. GAMC provides medical care to those who do not qualify for MA but are unable to pay for necessary care. See id. at 23.

In 1978, the Minnesota legislature enacted several provisions restricting MA/GAMC coverage for abortions. See Doe, 542 N.W.2d at 23. These provisions remained largely unchanged until the Minnesota Supreme Court held in Doe that they violated a woman's right to privacy under the Minnesota Constitution. See id. at 23, 32. The Doe Court held that "the State cannot refuse to provide abortions to MA/GAMC-eligible women when the procedure is necessary for therapeutic reasons." Id. at 32. Following Doe, the Minnesota Department of Human Services has provided funding for therapeutically necessary abortion services.

The Plaintiffs have filed suit against the Defendants to prevent state payment for abortion services beyond those allowed under federal law.[1] Since 1976, Congress has

[1] As stated above, the Plaintiffs also seek to recover taxes spent to fund abortion services, and to void the Minnesota Supreme Court's decision in Doe.

restricted the use of federal funds for both therapeutic and nontherapeutic abortions by amendment to the annual appropriations bill. See Doe, 542 N.W.2d at 22. This amendment, commonly referred to as the "Hyde Amendment," presently prohibits the use of federal funds to reimburse abortion services unless the pregnancy is the result of rape or incest, or unless the pregnancy threatens the life of the woman.[2] See id. & n.8.

Analysis

I. Standard of Review

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must take as true the allegations contained in the complaint. See Cooper v. Pate, 378 U.S. 546, 84 S. Ct. 1733 (1964) (per curiam). A complaint

> must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations. "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."

Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982) (quoting Jackson Sawmill Co. v. United States, 580 F.2d 302,

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[2] The United States Supreme Court affirmed the constitutionality of the Hyde Amendment in Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671 (1980).

306 (8th Cir. 1978)). Viewing the complaint in this manner, the court may dismiss a case under Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. See, Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957)).

II. Merits

The Plaintiffs allege that they are entitled to the relief they seek because: (1) payment for abortion services from public funds violates their rights to the free exercise of religion; (2) using public funds to pay for abortion services for indigent persons constitutes the use of public funds for private purposes in violation of the state and federal constitutions; (3) state payment for abortion services beyond those allowed by the Hyde Amendment violates the privileges and immunities clause of the federal constitution; (4) the Doe case decided by the Minnesota Supreme Court lacked a "case or controversy" and, therefore, was unconstitutional under the state and federal constitutions; and (5) the Doe decision violates the Minnesota Constitution's separation-of-powers principles. (See Compl.) The Defendants argue that the Court should dismiss the Plaintiffs' Complaint because, inter alia, they lack standing to bring their claims. (See Defs.' Mem. in Supp. of Mot. to Dismiss at 6-8 ("Defs.' Supp. Mem.").) The Plaintiffs respond that they have standing as taxpayers to contest state expenditures that violate the Free Exercise Clause of the First Amendment. (See Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 5-7 ("Pls.' Opp'n Mem.").)

"The jurisdiction of federal courts is limited to 'cases and controversies.'" Minnesota Fed'n of Teachers v. Randall, 891 F.2d 1354, 1356 (8th Cir. 1989) (citing U.S. Const. art. III). As part of determining whether a case or controversy

exists, the federal district court must decide whether the plaintiff is the proper party to litigate the dispute. To have standing to sue, the Constitution requires that each plaintiff show both an injury in fact and that he deserves the protection of the statutory or constitutional provisions invoked. See id. (citing Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 90 S. Ct. 827 (1970)). "In addition, prudential concerns sometimes militate against granting standing to those seeking to assert either the rights of others or generalized social grievances . . . ." Id. (citing Warth v. Seldin, 422 U.S. 490, 498-501, 95 S. Ct. 2197, 2204-06 (1975)).

Taxpayers have standing to challenge the constitutionality of federal expenditures only in limited circumstances. See Massachusetts v. Mellon, 262 U.S. 447, 486-89, 43 S. Ct. 597, 600-01 (1923). In Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942 (1968), the Supreme Court clarified the requirements for federal taxpayer standing, stating that the taxpayer must establish: (1) "a logical link between [his status as taxpayer] and the type of legislative enactment attacked;" and (2) "a nexus between that status and the precise nature of the constitutional infringement alleged." Id. at 102, 88 S. Ct. at 1953.

In the instant case, the Plaintiffs argue that they have standing by virtue of their status as taxpayers in the state of Minnesota. (See Pls.' Opp'n Mem. at 5-7.) With one exception not relevant here,[3] the analysis for state and federal taxpayer standing is the same. See Friedmann v. Sheldon Community Sch. Dist., 995 F.2d 802, 803-04 (8th Cir. 1993) (analyzing state taxpayer standing under Flast's two-prong

[3] In Randall, the Eighth Circuit made clear that under the Supreme Court's decision in Doremus v. Board of Education, 342 U.S. 429, 72 S. Ct. 394 (1952), a state taxpayer must also show a "measurable disbursement of state funds." Randall, 891 F.2d at 1357-58 & n.3. Because the Defendants do not dispute this fact, the Court will assume that the Plaintiffs have satisfied this additional standing requirement.

test); Randall, 891 F.2d at 1357 (noting that the effect of Flast was to harmonize federal and state taxpayer standing). Accordingly, the Court will apply the rule delineated in Flast and its progeny to the Plaintiffs' alleged standing as taxpayers.

Assuming that the Plaintiffs have established "a logical link between [their status as taxpayers] and the type of legislative enactment attacked," the Court nonetheless finds that they have failed to show a "nexus between [taxpayer] status and the precise nature of the constitutional infringement alleged." In Flast, the Supreme Court found that the second requirement was satisfied where the congressionally authorized expenditure in question violated the Establishment Clause of the First Amendment. Flast, 392 U.S. at 105, 88 S. Ct. at 1955. Unlike Flast, the Plaintiffs have not alleged that the Defendants' conduct violates the Establishment Clause. Instead, the Plaintiffs argue that Flast's second requirement can be met where the challenged expenditure violates the Free Exercise Clause of the First Amendment. (See Pls.' Opp'n Mem. at 5-7.) The Plaintiffs, however, have cited no cases that extend Flast to the Free Exercise Clause, and to the Court's knowledge none exist. Indeed, federal courts have consistently recognized that Flast creates a narrow exception to the general bar against taxpayer suits and that it is limited to violations of the Establishment Clause. See Randall, 891 F.2d at 1356 ("Flast and its progeny establish that a federal taxpayer may sue to prevent the disbursement of tax money where the disbursement violates the establishment clause of the first amendment and where the disbursement is made pursuant to Congress' power to tax and spend."); see also Bartley v. United States, 123 F.3 d 466, 470 (7th Cir. 1997) (collecting cases recognizing that Flast announced a limited exception to the general rule against taxpayer standing), cert. denied, 118 S. Ct. 723 (1998); Rocks v. City of Philadelphia, 868 F.2d 644, 649 (3d Cir. 1989) (noting that Flast is an "extremely limited holding" granting taxpayer standing to

plaintiffs who "raise establishment clause claims against exercises of congressional power under the taxing and spending power of article I, section 8 of the constitution."). Accordingly, the Court finds that the Defendants' alleged violation of the Free Exercise Clause does not give the Plaintiffs taxpayer standing. Because the Plaintiffs lack standing, the Court will grant the Defendants' Motion and dismiss, the Plaintiffs' claims.

Conclusion

Accordingly, for the foregoing reasons, and based upon all of the files, records, and proceedings herein, **IT IS ORDERED** that the Defendants' Motion to Dismiss (Doc. No. 5) is **GRANTED** and the Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

June 23, 1999

s/
RICHARD H. KYLE
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-2986

James Tarsney, Joe Loeffler, Wayne Olhoft, Tad Jude, Dr. Steve Calvin, Dr. Karen Karn, Dr. Konald Prem, Dr. Stanley Johnson, Brian Gibson, Jack Weiland, Russ Rooney, Mary Rooney, David Racer, Eugene Keating, Joseph Kueppers, John C. Cerrito, David States, Mary Kay States, Keith Jensen, Elizabeth Jensen, Roberta Becker, Linda Pettman, Karen Messicci, Angela Heithaus, Renae Lavoi, Cheri Emde, Mary Jacobs, Judy Hadley, Beth Gerlach, Mitzi Speranzella, Joan Appleton, Becky Saad, Marlene Reid, Bernadine Scroggins, Dr. Paul Spencer, Judi Spencer, Virginia Benyon, Jenifer Latawiec, Maria Schmitz, Barbara (Basia) Zebro, Cletus Tauer, Ramona Tauer, Peg Cullen, Meghan Jones, Mary Prior, Ruth Powers, Jolene Schmitz,

Plaintiffs-Appellants,

Appeal from the United States District Court for the District of Minnesota.

v.

Michael O'Keefe, Commissioner, Department of Human Services, State of Minnesota,

Defendant-Appellee.

The Roman Catholic Archdiocese, of St. Paul and Minneapolis; American Center for Law and Justice; The Knights of Columbus, St. Louis Park Council #3949, Inc.; Members of the Minnesota Legislature; Minnesota Lawyers for Life,

Amici on Behalf of Appellants.

Submitted: June 15, 2000
Filed: September 11, 2000

Before MURPHY, HEANEY, and MAGILL, Circuit Judges.

MURPHY, Circuit Judge.

This case was brought by forty-seven individuals seeking declaratory and injunctive relief against the State of Minnesota, the Minnesota Department of Human Services,

and Commissioner Michael O'Keefe, including enjoining them from using state funds to pay for certain abortions for low income women. State funds have been used for these abortions since the Minnesota Supreme Court overturned a state statutory scheme which authorized state spending on medical services related to childbirth but prohibited it for therapeutic abortions. In this case the plaintiff taxpayers allege that use of state money for abortions infringes upon the free exercise of their religion. The district court[1] dismissed the case for lack of standing. The plaintiffs appeal, and several amicus briefs have been submitted in support.[2] Because the appellants have not established standing, the federal court is without jurisdiction to reach the merits of the issues raised in their complaint, and we affirm its dismissal.

I.

Many issues relating to the provision of abortion services have been legislated and litigated since the Supreme Court recognized a constitutional right to abortion in Roe v. Wade, 410 U.S. 113 (1973), and a number have related to the use of public funds for abortions. Since September 1976, Congress has prohibited the use of federal funds to reimburse the cost of abortions under Medicaid except under certain limited circumstances. See Harris v. McRae, 448 U.S. 297, 302 (1980). This federal policy is commonly known as the Hyde Amendment after its original sponsor, Representative Henry Hyde, and it is effected by means of an amendment to the annual appropriations bill for the Department of Health and

[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

[2] Amicus briefs have been submitted by the Roman Catholic Archdiocese of St. Paul and Minneapolis; American Center for Law and Justice; The Knights of Columbus, St. Louis Park Council #3949, Inc.; Members of the Minnesota Legislature; and Minnesota Lawyers for Life.

Human Services or by a joint resolution. See id. The Minnesota legislature restricted state funding for abortion services in 1987 when it passed laws prohibiting two Minnesota health care programs for indigent persons (the Medical Assistance Program (MA) and the General Assistance Medical Care Program (GAMC)) from using state funds to pay for abortion services.[3] See Minn. Stat. Ann. § 256B.0625, subd. 16; § 256D.03, subd. 4(j).

These Minnesota statutory restrictions on public funding for abortions for low income women were challenged in state court by a class of individual women, several abortion providers, and an abortion funding agency. See Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995). The plaintiffs in Doe had alleged that the funding restrictions impermissibly infringed a woman's right to privacy in violation of Article I, Sections 2, 7, and 10 of the Minnesota constitution, and the Minnesota Supreme Court agreed. See id. at 26, 32. The court chose not to interpret the state constitution as narrowly as the federal Constitution had been read in Harris v. McRae, 448 U.S. 297 (1980), where the Supreme Court held that the Hyde restrictions on federal abortion funding did not violate any substantive rights in the federal Constitution. The Minnesota court stated that it had "long recognized that [it might] interpret the Minnesota Constitution to offer greater protection of individual rights than the U.S. Supreme Court

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[3] The MA program is a joint federal-state program created under Title XIX of the Social Security Act and is known as Medicaid at the federal level; Minnesota issues payments for services and then receives partial reimbursement from the federal government. See Minn. Stat. Ann. § 25613.22 (1998). The federal Medicaid program prohibits Minnesota, through the inclusion of the Hyde Amendment in annual appropriations, from using federal funds under its MA program to pay for abortion services unless the pregnancy resulted from rape or incest or unless it threatens the woman's life. The GAMC program is completely funded by the state and reimburses medical services for indigent persons who do not qualify for MA. See Minn. Stat. Ann. § 256D.02, subd. 4a; § 256D.03, subd. 3 (1998).

has afforded under the federal constitution." Doe, 542 N.W.2d at 30. The court noted that a "substantial majority" of state courts that had addressed a similar issue had construed their state constitutions to provide greater protection for individual liberty for abortion services than that provided by the United States Constitution. Id. at 28.[4] Minnesota has subsequently paid for therapeutically necessary abortion services in circumstances where federal funding is unavailable because of the Hyde Amendment.

In this case the appellants seek to challenge state expenditures for abortions, as well as the validity of the Minnesota Supreme Court's Doe decision. In their complaint they alleged standing as state taxpayers to raise several claims. They alleged that the use of state funds for abortions violates their state and federal rights to the free exercise of religion; that the appellees are unconstitutionally using public funds for private purposes; that state payment for abortion services beyond those allowed by the Hyde Amendment violates the Privileges and Immunities Clause of the federal constitution; and that Doe v. Gomez is invalid under the state and federal constitutions because of the absence of a case or controversy and that it violated the state constitution separation of powers requirement. The appellants seek a declaration that Doe is void, an injunction prohibiting the state from using public funds to pay for abortion services beyond those allowed by the Hyde Amendment, and a refund of the amount of their taxes used to fund abortion services.

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[4] The Minnesota Supreme Court cited cases from courts in California, Connecticut, Illinois, Massachusetts, Montana, New Jersey, New Mexico, Oregon, and West Virginia that had reached similar results. See Doe, 542 N.W.2d at 28-29 n.12. In the time since Doe was decided several other state cases have been decided similarly. See, Renee B. v. Florida, 756 So.2d 218, 221 n.2 (Fla. Dist. Ct. App. 2000) (citing Planned Parenthood v. Perdue, No. 3AN 98-7004 CI, slip op. (Alaska Super. Ct. Mar. 16, 1999); Roe v. Harris, No. 96977, slip op. (Idaho Dist. Ct. Feb. 1, 1994)).

Most of the appellants identified themselves as members of religious groups opposed to abortion.[5] Two of them, Wayne Olhoft and Tad Jude, were identified as former Minnesota state legislators.

The state parties moved to dismiss the complaint on several grounds. They argued that the appellants had only alleged standing to bring their Free Exercise Clause claim so any other claims should be dismissed and that taxpayer standing was not available to raise a claim under the Free Exercise Clause. The appellants argued in response that they should have taxpayer standing to sue under the Free Exercise Clause just as they might raise an Establishment Clause claim. The district court concluded that the appellants lacked taxpayer standing and granted the motion to dismiss.

Appellants argue again on appeal that they have standing as state taxpayers to bring a Free Exercise Clause challenge to the use of state funds to pay for medically necessary abortions for MA- and GAMC-eligible persons. They also now contend that they have standing under the Civil Rights Act, 42 U.S.C. § 1983, and the Hyde Amendment and as state legislators. The state parties respond that state taxpayer standing is not available for Free Exercise Clause claims, that the appellants did not properly plead any alternative standing grounds, and that the suggested grounds would not confer standing here even if they had been raised.

We review a decision dismissing a complaint for lack of standing de novo, "construing the allegations of the complaint, and the reasonable inferences drawn therefrom, most favorably to the plaintiff." Burton v. Central Interstate Low-Level Radioactive Waste Compact Comm'n, 23 F.3d

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[5] The appellants belong to groups that include Minnesota Lawyers for Life, the Roman Catholic Church, the Lutheran Church, Pro Life Action Ministries, the Minnesota Family Council, Project Life, Human Life Alliance of Minnesota, Inc., Pro Life Nurses, and Minnesota Natural Family Planning.

208, 209 (8th Cir.), cert. denied, 513 U.S. 951 (1994); see Warth v. Seldin, 422 U.S. 490, 501 (1975).

II.

Standing is "the threshold question in every federal case...." Warth, 422 U.S. at 498. Federal court jurisdiction is "defined and limited by Article III of the Constitution...[and] is constitutionally restricted to 'cases' and 'controversies'." Flast v. Cohen, 392 U.S. 83, 94 (1968). A case or controversy exists only if a plaintiff "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). If a plaintiff has not suffered an injury, there is no standing and the court is without jurisdiction to consider the action. See Allen v. Wright, 468 U.S. 737, 750-66 (1984).

The appellants allege that the use of state funds to pay for abortions violates their Free Exercise Clause rights because a portion of their tax revenue is being used to fund abortions, a practice that they oppose on moral and religious grounds. They argue that standing analysis for taxpayers should be the same for claims brought under either the Establishment Clause or the Free Exercise Clause because there is "no heirarchy of constitutional values." They urge this court to expand the holding in Flast v. Cohen, 392 U.S. 83 (1968), in which the Supreme Court recognized taxpayer standing to raise Establishment Clause claims because that clause "specifically limit[s] the taxing and spending power conferred by Art. I, § 8." Id. at 105. In that case the Supreme Court left open the question of whether there could ever be taxpayer standing to raise Free Exercise Clause claims. See id. at 104 n.25.

The First Amendment, which has been applied to the states through the Fourteenth Amendment, see Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), provides in relevant

part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. amend. I. Even though the two religion clauses are found in the same sentence of the First Amendment, there is a clear distinction between them. See Walz v. Tax Comm'n of New York, 397 U.S. 664, 667-72 (1970). The Supreme Court has pointed out that "[a]lthough these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." Engel v. Vitale, 370 U.S. 421, 430 (1962). The Free Exercise Clause, by contrast, protects the right of citizens to exercise religious beliefs free of any governmental interference or restraint. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963). Its protections "pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993), and it is not violated in the absence of a "showing of direct governmental compulsion," see Engel, 370 U.S. at 430.

Laws of general applicability with only an incidental effect on religion do not violate the Free Exercise Clause. See City of Boerne v. Flores, 521 U.S. 507, 513-14 (1997); Employment Div., Dept of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-80 (1990). The Supreme Court has instructed that "the right of free exercise [of religion] does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Smith, 494 U.S. at 879 (quoting

United States v. Lee, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)). A variety of generally applicable federal and state laws apply to religious organizations and their members. As the Court explained in holding that Amish plaintiffs were not entitled to exemption from paying social security taxes:

> [I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.....There is no principled way...to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Lee, 455 U.S. at 259-60 (citations omitted); see also Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 698-700 (1989) (Internal Revenue Code); South Ride Baptist Church v. Industrial Comm. of Ohio, 911 F.2d 1203, 1206-10 (6th Cir. 1990), cert. denied, 498 U.S. 1047 (1991) (workers compensation); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1397-99 (4th Cir.), cert. denied, 498 U.S. 846 (1990) (minimum wage laws); EEOC v. Tree of Life Christian Schs., 751 F. Supp. 700, 70913 (S.D. Ohio 1990) (Equal Pay Act). Appellants have not contested their obligation to pay taxes, and citizens may not opt out of paying

general taxes. See Lee, 455 U.S. at 260; Tilton v. Richardson, 403 U.S. 672, 689 (1971); cf. Smith, 494 U.S. at 879.

Because the two clauses require different things from the government in its interaction with religion, they are not analyzed in the same way for purposes of taxpayer standing. When the government spends public money in violation of the Establishment Clause, a taxpayer suffers a direct injury because the government is improperly promoting religion. See Flast, 392 U.S. at 114 (Stewart, J., concurring) ("Because [the Establishment Clause] plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution."). The clause operates as a specific limitation on Congress' taxing and spending power, see id. at 105-06, and standing therefore exists for citizens whose taxes are expended to finance instruction in religious schools or for textbooks and materials used in them, for example, see id. at 85-86.

The Free Exercise Clause on the other hand is a constitutional guarantee of non interference by the government with religious practice. See Tilton, 403 U.S. at 689. It follows that when the government appropriates public funds, it is not doing anything the Constitution prohibits unless the expenditure directly prevents an individual from exercising religious beliefs. If there were direct interference, such as use of public funds to prevent members of a religious group from voicing their opposition to abortion, standing would exist for a church member on the basis of direct injury. A taxpayer who was not affected by the allegedly unconstitutional expenditure would not have taxpayer standing to challenge the expenditure, however. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 223 n.13 (1974) (Article III standing requirements not satisfied by "the abstract injury in nonobservance of the Constitution asserted by . . . citizens"). The general principle

is that a Free Exercise Clause injury does not arise from the expenditure itself, but from the resulting limitation on religious exercise. The Free Exercise Clause does not operate as a specific limitation on the taxing and spending power of Congress which the Supreme Court discussed in Flast, and taxpayers do not have standing to bring claims under it unless they can show direct injury.

The concurring opinions by Justices Stewart and Fortas highlighted the limited nature of the taxpayer standing permitted by the Flast decision, and the Court's subsequent discussions of Flast are consistent with their statements of the holding.[6] See, e.g., Bowen v. Kendrick, 487 U.S. 589, 618-20 (1988); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 476-82 (1982); United States v. Richardson, 418 U.S.166, 176-80 (1974); Schlesinger, 418 U.S. at 227-28. The Court could have easily recognized taxpayer standing to raise Free Exercise Clause claims in Flast if it had wished because the plaintiffs there had pleaded standing under both religion clauses. The Court instead chose not to address the issue since the Establishment Clause claim "was sufficient to establish the nexus between their [taxpayer] status and the precise nature of the constitutional infringement alleged . . . ." Flast, 392 U.S. at 104 n.25. The Court cautioned that while it

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[6] See Flast, 392 U.S. at 114 (Stewart, J., concurring) ("I join the judgment and opinion of the Court, which I understand to hold only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the Establishment Clause...."); see id. at 115-16 (Fortas, J., concurring) ("I would confine the ruling in this case to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the Establishment Clause.... There is no reason to suggest, and no basis in the logic of this decision for implying, that there may be other types of congressional expenditures which may be attacked by a litigant solely on the basis of his status as a taxpayer.... The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislation affecting the Establishment Clause.").

had previously recognized that use of the taxing power could infringe the free exercise of religion, it had done so only in a case involving a tax that "operated upon a particular class of taxpayers." See id. (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943) (state license fee that is a condition to distributing religious literature violates Free Exercise Clause)).

The Court pointed out in its decision in Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 476-82 (1982), that it had recognized only a limited exception in Flast where there could be taxpayer standing. Were it to confer standing on the Establishment Clause basis sought in Valley Forge, which did not relate to the congressional taxing and spending power, "there would be no principled basis for confining our exception to litigants relying on the Establishment Clause." Valley Forge, 454 U.S. at 489. It declined to expand the exception and stated that "[a]ny doubt that once might have existed concerning the rigor with which the Flast exception to the Frothingham principle ought to be applied should have been erased by this Court's recent decisions in United States v. Richardson and Schlesinger v. Reservists Comm. to Stop the War." Id. at 481(citations omitted) (cases not addressing the taxing and spending power). Several years later the Court was equally explicit: "Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since [Flast], we have consistently adhered to Flast and the narrow exception it created to the general rule against taxpayer standing established in Frothingham v. Mellon, 262 U.S. 447 (1923)." Bowen, 487 U.S. at 618.

Federal appellate courts have followed the Supreme Court's lead in refusing to expand the exception adopted in Flast. See, e.g., Minnesota Fed. of Teachers v. Randall, 891 F.2d 1354,1358 (8th Cir. 1989) ("We believe that taxpayer standing was created to specifically permit the airing of

establishment clause claims...."); Colorado Taxpayers Union, Inc., v. Romer, 963 F.2d 1394, 1399 (10th Cir. 1992), cert. denied, 507 U.S. 949 (1993) ("[T]he Court has indicated that Flast applies only to cases in which a federal taxpayer challenges a congressional appropriation made pursuant to Article I, Section 8 that allegedly violates the Establishment Clause of the First Amendment."); Rocks v. City of Philadelphia, 868 F.2d 644, 649 (3d Cir. 1989) ("Flast and Bowen are extremely limited holdings. They hold that federal taxpayers have standing to raise establishment clause claims against exercises of congressional power under the taxing and spending power of article I, section 8 of the constitution."); Taub v. Kentucky, 842 F.2d 912, 916 (6th Cir.), cert. denied, 488 U.S. 870 (1988) ("Flast v. Cohen appears to create a fairly narrow exception to the [rule against taxpayer standing], and may apply only to Establishment Clause cases...."); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1531-32 (9th Cir.), cert. denied, 474 U.S. 826 (1985) (no standing to raise Free Exercise Clause claim where only identified interest is taxpayer status).

The requirement to show a direct injury for free exercise standing comports with the bedrock notion that federal court jurisdiction is limited by separation of powers concerns to "cases" and "controversies." U.S. Const. art. III; see Valley Forge, 454 U.S. at 471-72 ("Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies,'" and "[a]s an incident to the elaboration of this bedrock requirement, [the Supreme Court] has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit."). Allowing state taxpayers to litigate claims of unconstitutional expenditures without having to show a direct injury would "seriously undermine the constitutional commitment to federalism." Colorado Taxpayers Union, Inc., 963 F.2d at 1403. If taxpayers were granted standing to challenge state expenditures without demonstrating a direct

injury, the ability of states to govern could be seriously impeded. For example, plaintiffs could sue on the basis of religious beliefs to challenge state funding for executions, stem cell research, civil unions, or various civil rights laws. Aggrieved individuals always have the option to take their concerns about expenditures to the political branches of government, but Article III controls whether the concerns can be addressed in federal court.

Here appellants must identify a direct injury they have experienced from state interference in order to have standing to raise their Free Exercise Clause claim. See Schempp, 374 U.S. at 224 n.9 (requirements for standing to challenge state action under the Free Exercise Clause include "proof that particular religious freedoms are infringed"); Colorado Taxpayers Union, Inc., 963 F.2d at 1401(plaintiff must show that the allegedly unconstitutional expenditure is "tied to a direct and palpable injury threatened or suffered" in order to secure standing). The injury cited in appellants' complaint is requiring them "to support abortion" with their taxes which "is not only noxious to [their] beliefs but also sinful according to their religious faith." Compl. at 13, ¶64. They cite no case in which a court has recognized a perceived moral injury to be the type of direct injury which can confer standing. As the Supreme Court has explained, plaintiffs do not have standing if they do not

> identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms . . . . [S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge, 454 U.S. at 485-86 (emphasis in original); see also Allen, 468 U.S. at 755 (no standing to litigate claims based on stigmatizing injury caused by racial discrimination unless plaintiff personally has been denied a benefit).

We conclude that the appellants do not have taxpayer standing to bring their Free Exercise Clause claim challenging the expenditure of state funds for abortions for low income women and that they have not demonstrated a direct injury sufficient to confer standing.

III.

The appellants also contend that they pleaded alternative grounds for standing beyond that as taxpayers. They say they have standing under the Civil Rights Act, 42 U.S.C. § 1983, under the Hyde Amendment, and as state legislators. The appellees argue that it would be improper to consider these theories because they were not raised before the district court and that they would not confer standing in any event.

We generally decline to address arguments raised for the first time on appeal, see United Waste Sys. of Iowa, Inc. v. Wilson, 189 F.3d 762, 768 n.4 (8th Cir. 1999), but we may decide to do so "where the proper resolution is beyond any doubt. . . or when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case." Universal Title Ins. Co. v. United States, 942 F.2d 1311, 1314-15 (8th Cir. 1991) (internal quotations and citations omitted). It is well established that the Civil Rights Act, 42 U.S.C. § 1983 (1994), cannot confer standing. The statute does not itself create substantive rights, but "merely provides remedies for deprivations of rights established elsewhere." City of Okla. City v. Tuttle, 471 U.S. 808, 816 (1985). Standing must be established on another basis before a section 1983 claim can proceed. See, e.g., Warth, 422 U.S. at 518. Appellants contend that they have standing through section 1983 to enforce the Medicaid

statute, as amended by the Hyde Amendment, but they are not the intended beneficiaries of the amendment since they are not seeking reimbursement or medical services. Cf. Little Rock Family Planning Servs., P.A. v. Dalton, 60 F.3d 497, 501-02 (8th Cir. 1995), rev'd in part on other grounds, 516 U.S. 474 (1996). Even if the appellants could show they were beneficiaries of the Hyde Amendment, it only concerns the expenditure of federal funds and they have not suggested that Minnesota has misspent any such funds. Two appellants, Wayne Olhoft and Tad Jude, also contend that they have standing as former state legislators based on their legislative involvement with the statutes overturned in Doe. The general rule is that when "a court declares an act of the state legislature to be unconstitutional, individual legislators who voted for the enactment [have no standing to] intervene." Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Ehlmann, 137 F.3d 573, 578 (8th Cir. 1998); cf. Coleman v. Miller, 307 U.S. 433 (1939). Even if these appellants might have had legislator standing at some point, such standing would have terminated when they left office. See Karcher v. May, 484 U.S. 72, 81 (1987).

IV.

In sum, we conclude that appellants do not have taxpayer standing to raise their Free Exercise Clause claim and have not established standing under any of the other grounds which they claim to have pleaded. The district court therefore did not err in dismissing the claims.

MAGILL, Circuit Judge, dissenting.

Contrary to the majority's assertion, the appellants' standing claim does not require the court to "expand" the holding in Flast v. Cohen, 392 U.S. 83 (1968), because Flast is not applicable to this case. The taxpayers here are seeking

declaratory and injunctive relief against, among others, the State of Minnesota, attempting to enjoin Minnesota from using state funds to pay for certain abortions for low income women. The majority's analysis, while persuasive if this case involved federal taxpayer standing, is inapplicable to our case which involves state taxpayer standing. The distinction is important because standing in state taxpayer cases is not limited to cases involving Establishment Clause claims. Because the majority's opinion fails entirely to recognize that parties may properly bring non-Establishment Clause claims under state taxpayer standing, I must respectfully dissent.

I.

The downfall of the majority's analysis began when it examined what is clearly a case of state taxpayer standing under a line of cases that deal only with federal taxpayer standing. Respectfully, the majority erred when it focused its attention on Flast and asserted that it controlled this case. Flast involved an action to enjoin expenditure of federal funds for purchase of textbooks and other instructional materials for use in parochial schools. See id. at 85-86. As many circuit courts have recognized, the test that Flast announced only applies to federal taxpayer cases; in other words, cases against the federal government. For example, part of the limitations that the Court imposed on "federal taxpayers" indicated that standing would only be found in suits alleging the "unconstitutionality [] of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." Id. at 102. The other Supreme Court cases the majority relies on in rejecting appellants' taxpayer status claims are similarly inapplicable to our case because they all involved issues of federal taxpayer standing. See Bowen v. Kendrick, 487 U.S. 589 (1988) (involving a challenge to a federal grant program); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454

U.S. 464 (1982) (involving a challenge to federal action); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (involving action against the Secretary of Defense); United States v. Richardson, 418 U.S. 166 (1974) (involving an action against the Secretary of the Treasury).

The Supreme Court has not yet indicated what requirements must be met in state taxpayer standing cases, but every circuit court, including the Eighth, that has considered the issue has held that the principles of Doremus v. Board of Education, 341 U.S. 429 (1952), and not Flast, control state taxpayer standing. In Minnesota Federation of Teachers v. Randall, 891 F.2d 1354 (8th Cir. 1989), the Eighth Circuit clearly indicated that Doremus controlled state taxpayer standing cases. In Randall, the issue was whether Doremus requires that a taxpayer must show an increased tax burden in order to have state taxpayer standing. See id. at 1356. The district court in Randall had recognized that under Flast only a disbursement of public funds was required but held that the injury analysis for state taxpayers was still analytically distinct. See id.

The Eighth Circuit clarified Doremus, holding that Doremus only requires a measurable expenditure of tax money to establish state taxpayer standing and noting that "Flast and Doremus are now relied on interchangeably where establishment clause violations are urged." Id. at 1357.

Other courts that have considered the issue of what line of cases control state taxpayer standing have also indicated that Doremus controls. Colorado Taxpayers Union, Inc. v. Romer, 963 F.2d 1394 (10th Cir. 1992), is one such case that carefully examines the issues involved in state taxpayer cases. In Colorado Taxpayers, after discussing Flast, the Tenth Circuit said that "[b]oth parties mistakenly rely on Flast to resolve whether appellants qualify for taxpayer standing in this case. Flast does not directly govern this appeal because it applies to federal taxpayer standing issues, not questions relating to standing for state taxpayers." Id. at 1399. Instead,

the court indicated that the principles of Doremus still apply to state taxpayer cases. See id. at 1399-1400.

Other circuits have agreed with the Tenth Circuit that Doremus controls state taxpayer cases. In Taub v. Kentucky, 842 F.2d 912 (6th Cir. I988), the Sixth Circuit indicated that "in those cases where violation of the Establishment Clause is not alleged . . . [i]n order to have standing, a state taxpayer must allege direct and palpable injury with sufficient specificity to meet the 'good-faith pocketbook' requirement of Doremus." Id. at 918. See also Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 793 (9th Cir. 1999) (en banc) (noting that "[p]laintiff has challenged the use of municipal and state (rather than federal) tax revenues. That being so, [Doremus] controls the requirements for taxpayer standing in this case."); Board of Educ. v. New York State Teachers Retirement Sys., 60 F.3d 106, 110 (2d Cir. 1995) (indicating that Doremus controls state taxpayer cases).

II.

Although the circuits have affirmed the obvious, that Doremus, and not Flast, controls issues of state taxpayer standing, they have disagreed on the injury a state taxpayer must allege to establish standing. There are two different tests for standing. One test requires that the plaintiff show that her taxes have been increased by the alleged illegal activity and the other has no such requirement. With all due respect, the majority should have explicitly dealt with this difficult issue because the test that the Eighth Circuit adopts could be dispositive in this and other cases.

According to the Tenth Circuit, Doremus requires that state taxpayers satisfy the "good-faith pocketbook" requirement in order to have standing. See Colorado Taxpayers, 963 F.2d at 1399-1400. The "good-faith pocketbook" requirement mandates that "where an Establishment Clause violation is not asserted, a state

taxpayer must allege that appropriated funds were spent for an allegedly unlawful purpose and that the illegal appropriations and expenditures are tied to a direct and palpable injury threatened or suffered." Id. at 1401. The injury required for standing is not met merely by showing that funds were appropriated and spent for an unlawful purpose; it requires a showing that the illegal activity resulted in an increased tax burden. See id. at 1403. See also Board of Educ., 60 F.3d at 110 (agreeing with the Tenth Circuit test); Taub, 842 F.2d at 917-19 (same).

In contrast to the circuits mentioned above, the Ninth Circuit does not require that the taxpayer prove that her tax burden will be lightened by elimination of the questioned expenditure. In Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984), the Ninth Circuit examined the issue of state taxpayer standing and concluded that the plaintiffs met the Doremus requirements. In Hoohuli, the plaintiffs, as state taxpayers, brought an action challenging a system established by the State of Hawaii that disbursed benefits to residents who had descended from aboriginal inhabitants of the islands. See id. at 1172. The Ninth Circuit announced a three-part test for state taxpayer standing: 1) taxpayer status; 2) the appropriation of monies from the state's general funds; and 3) the spending of those funds for allegedly unlawful proposes. See id. at 1179-80. See also Cammack v. Waihee, 932 F.2d 765, 769 (9th Cir. 1991) (stating that "Hoohuli, the leading case on this issue in the circuit, does not require that the taxpayer prove that her tax burden will be lightened by elimination of the questioned expenditure"). Based on its three-part test, the Ninth Circuit held that the plaintiffs had standing. First, each of the plaintiffs set forth his or her status as a taxpayer. See Hoohuli, 741 F.2d at 1180. Second, the taxpayers challenged the appropriation, transfer, and spending of taxpayers' money from the general fund of the state treasury and claimed that their tax dollars were being spent on a program which disbursed benefits based on impermissible

racial classifications. See id. Third, the plaintiffs' pleadings "set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes." Id.

It is unclear what test the Eighth Circuit has adopted. Both the Ninth and Tenth Circuits believe that our decision in Randall adopted the Ninth Circuit test. See Colorado Taxpayers, 963 F.2d at 1400 (stating that "[t]he Eight Circuit, in [Randall], agreed with the Ninth Circuit's approach to state taxpayer standing"); Cammack, 932 F.2d at 769 (citing Randall as following the Ninth Circuit's approach). However, it could be that the Randall court intended to limit its holding to Establishment Clause claims. Randall involved an Establishment Clause claim which both the Tenth Circuit, see Colorado Taxpayers, 963 F.2d at 1401, and the Sixth Circuit, see Taub, 842 F.2d at 917, have indicated, unlike non-Establishment Clause claims, do not have to meet the usual state taxpayer requirement of showing an increased tax burden due to the illegal activity.

The Ninth Circuit's test is persuasive and it very well may be that the court in Randall adopted it for all state taxpayer cases. However, in light of the majority's refusal to join the debate, it seems fruitless for me at this time to give an opinion on which test the Eighth Circuit has or should adopt, whether the plaintiffs in this case have satisfied the requirements of the appropriate test, and, if not, whether their suit should be dismissed or remanded.

III.

The majority's failure to properly distinguish between state and federal taxpayer standing has led it to the erroneous conclusion that because the plaintiffs in this case allege non-Establishment Clause claims,[7] they automatically do not

[7] It almost goes without saying that courts have never considered state, unlike federal, taxpayer standing to be limited to Establishment Clause claims. See, e.g., Board of Educ., 60 F.3d at 109 (involving a

have standing. While perhaps true in federal taxpayer cases, a cursory review of state taxpayer cases shows that state taxpayers have standing for any claim as long as they meet the requirements of Doremus. In this case, as in Colorado Taxpayers, both parties may have mistakenly relied on Flast to resolve whether appellants qualify for taxpayer standing. However, ignorance by parties should not carry over to this court. This case should be decided through a proper consideration of the relevant cases and issues. By conflating federal and state taxpayer standing, the majority has failed to discuss the difficult issues of state taxpayer standing raised in this appeal. Accordingly, I dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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claim that the state violated the Contracts Clause of the Constitution and violated the Due Process Clause of the Fourteenth Amendment); Colorado Taxpayers, 963 F.2d at 1395 (involving a First Amendment free speech claim); Taub, 842 F.2d at 914 (involving an allegation that certain actions of Kentucky violated Article I, Section 10 and the Fifth and Fourteenth Amendments); Hoohuli, 741 F.2d at 1172 (involving a discrimination claim under the Fourteenth Amendment).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2986MNMI

James Tarsney, et al,	*	
	*	
Appellants,	*	
	*	Order Denying Petition for
v.	*	Rehearing and for
	*	Rehearing En Banc
Michael O'keefe, etc.,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. Judge Beam and Judge Bye would grant the petition.

The petition for rehearing by the panel is also denied. (5128-010199)

November 9, 2000

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit